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2                   UNITED STATES DISTRICT COURT  
3                   EASTERN DISTRICT OF WASHINGTON

4  
5                   UNITED STATES OF AMERICA,

6                   Plaintiff,

7                   v.

8                   JOHN A. GRACE,

9                   Defendant.

10                  No. CR-04-0026-FVS

11                  ORDER DENYING DEFENDANT'S  
12                  MOTION FOR MODIFICATION OF  
13                  SENTENCE

14                  **THIS MATTER** came before the Court on Defendant's motion for  
15                  "modification of sentence pursuant to 18 U.S.C. § 3582(c)(2)." (Ct.  
16                  Rec. 217). Assistant United States Attorney Joseph H. Harrington  
17                  represents the United States, and Defendant is proceeding pro se.

18                  **BACKGROUND**

19                  On February 10, 2005, Mr. Grace was convicted by a jury of  
20                  distribution of 5 grams or more of cocaine base in violation of  
21                  of 21 U.S.C. § 841(a)(1), and assault on a federal officer in  
22                  violation of 18 U.S.C. § 111(a)(1). (Ct. Rec. 135). The base offense  
23                  level for Count 1 was initially calculated as 28 pursuant to U.S.S.G.  
24                  § 2D1.1(c)(6). However, the Court determined that a downward  
25                  departure of four offense levels was warranted based on an unjustified  
26                  disparity in the guidelines between cocaine base and powder cocaine  
                        and the fact that Mr. Grace lost vision in his right eye from a

1 gunshot wound sustained during the commission of the crime. (Ct. Rec.  
2 177 at 3-4). Mr. Grace's guideline range, based on an adjusted  
3 offense level of 26 and a criminal history category of IV, was 92 to  
4 115 months. Mr. Grace, however, was sentenced to 120 months  
5 incarceration, the statutory minimum.

6 **DISCUSSION**

7 18 U.S.C. § 3582(c)(2), the statutory basis for Mr. Grace's  
8 motion, provides as follows:

9 [I]n the case of a defendant who has been sentenced to a term of  
10 imprisonment based on a sentencing range that has subsequently  
11 been lowered by the Sentencing Commission pursuant to 28 U.S.C.  
12 994(o), upon motion of the defendant or the Director of the  
13 Bureau of Prisons, or on its own motion, the court may reduce the  
term of imprisonment, after considering the factors set forth in  
section 3553(a) to the extent that they are applicable, if such a  
reduction is consistent with applicable policy statements issued  
by the Sentencing Commission.

14 The language of § 3582(c)(2) provides the Court with authorization to  
15 reduce a sentence where the applicable "sentencing range" has been  
16 subsequently lowered. Given that Mr. Grace was sentenced pursuant to  
17 a statute, and not under the U.S.S.G., there was no "sentencing range"  
18 which could be subsequently lowered by the Sentencing Commission. See  
19 U.S.S.G. § 5G1.1(b) (when the mandatory minimum for a crime exceeds the  
20 sentencing guideline range, the mandatory minimum becomes the  
21 guideline sentence, displacing the guideline range). Consequently,  
22 Section 3582(c)(2) does not confer jurisdiction on this Court to  
23 resentencing Mr. Grace. *United States v. Jackson*, 577 F.3d 1032, 1035-  
24 1036 (9th Cir. 2009) (a defendant sentenced pursuant to a mandatory  
25 minimum, and not a sentencing guideline range, is ineligible for a  
26 sentence reduction under § 3582(c)(2)); *United States v. Paulek*, 569

1 F.3d 1094, 1095 (9th Cir. 2009) (per curiam). The Court lacks  
2 jurisdiction to entertain Mr. Grace's motion.

3 Jurisdiction is lacking here for the additional reason that even  
4 if Mr. Grace had not been subject to a statutory minimum, his  
5 sentencing guideline range is the same now as it was at the time of  
6 his sentencing. At sentencing, the Court granted a four-level  
7 downward departure after taking into consideration the unjustified  
8 disparity between cocaine base and powder cocaine and the fact that  
9 Mr. Grace lost vision in his right eye from a gunshot wound sustained  
10 during the commission of the crime. (Ct. Rec. 177 at 3-4). No  
11 further reduction of Mr. Grace's sentence would be warranted because  
12 he has already been given a reduction based on this rationale.  
13 Accordingly, even if Mr. Grace had been sentenced pursuant to the  
14 guidelines, and not the statute, there has been no change which would  
15 lower that range. The Court lacks jurisdiction to modify or reduce  
16 Mr. Grace's sentence pursuant to Section 3582(c)(2) for this reason as  
17 well. See *United States v. Forcelledo*, 2009 WL 632932 at 2 (D.Or.  
18 2009) ("If a Guideline amendment does not actually lower a defendant's  
19 sentencing range . . . the sentencing court lacks jurisdiction to  
20 modify the sentence.").

21 The Court notes that Mr. Grace has had no incident reports since  
22 entering BOP custody and that he has completed his GED, enrolled in  
23 college courses, and is close to obtaining a liberal arts degree. The  
24 Court further notes that Mr. Grace has recently completed a 300-hour  
25 restaurant management program. The Court commends Mr. Grace for the  
26 efforts he has taken to improve himself and to provide more

opportunities to succeed when he is released. However, as discussed above, a reduction of Defendant's sentence is not authorized under 18 U.S.C. § 3582(c)(2).

The Court being fully advised, **IT IS HEREBY ORDERED**, Defendant's motion for a modification of his sentence (Ct. Rec. 217) is **DENIED**.

**IT IS SO ORDERED.** The District Executive shall forward copies of this order to Defendant and counsel for the Government.

**DATED** this 28th day of January, 2011.

S/Fred Van Sickle  
Fred Van Sickle  
Senior United States District Judge